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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL and ROYSPEC,

Petitioners,

—v.—

SCOTT NELSON and VIVIAN NELSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF HUMAN RIGHTS WATCH IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4, Human Rights Watch hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of the respondents in this case. The parties' consent has been requested. Respondents have consented, but petitioners have refused.

Human Rights Watch is a non-partisan, non-governmental human rights organization based in New York. It has submitted *amicus curiae* briefs to this and numerous other U.S. courts, and has substantial expertise on questions of international human rights law.

Through Middle East Watch, its regional division, Human Rights Watch monitors and reports on civil and political rights

conditions in the Middle East and North Africa. Members of its staff regularly travel to the region, including Saudi Arabia, to conduct interviews with victims and witnesses of human rights violations as well as to meet with government officials responsible for human rights matters.

Human Rights Watch believes that its detailed knowledge of human rights practices in Saudi Arabia will assist this Court in determining whether the abusive conduct alleged to have occurred in this case should be treated as "commercial activity" under the Foreign Sovereign Immunities Act ("FSIA"). The accompanying brief sets forth the results of extensive research into Saudi human rights practices which tend to show that such characterization is appropriate because the Saudi government often uses torture and detention to resolve commercial disputes.

The accompanying brief also brings to the Court's attention international law establishing a duty to provide torture victims with an opportunity to obtain compensation. Given the unlikelihood that petitioners can obtain compensation in Saudi courts, and in light of petitioner Scott Nelson's recruitment in the United States, Human Rights Watch believes that the Court should be aware of this international law in resolving any ambiguity in the reach of the "commercial activity" exception to the FSIA.

Because neither the pertinent international law nor the nature of Saudi human rights practices is likely otherwise to be brought to the attention of the Court, Human Rights Watch respectfully seeks leave to file the accompanying *amicus curiae* brief.

Dated: New York, New York
September 8, 1992

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BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH

Human Rights Watch submits this brief as *amicus curiae* in support of the affirmance of the order of the U.S. Court of Appeals for the Eleventh Circuit.

Interest of *Amicus Curiae*

Human Rights Watch is a non-partisan, non-governmental human rights organizations based in New York. It is the largest U.S.-based international human rights organization, and is composed of five regional divisions: Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, and Middle East Watch.

Human Rights Watch monitors violations of civil and political rights worldwide, including torture and arbitrary detention. It has conducted multiple fact-finding investigations in scores of countries. Its reports on human rights conditions have received significant attention from the State Department, Congress, the United Nations, and the press. By exposing and focusing public attention on human rights violations, Human Rights Watch seeks to end abusive practices.

Middle East Watch is the division of Human Rights Watch that monitors and reports on human rights conditions in the Middle East and North Africa. Members of its staff regularly travel to the region, including Saudi Arabia, to interview victims and witnesses of human rights violations as well as to meet with government officials.

Human Rights Watch has submitted *amicus curiae* briefs to this and numerous other U.S. courts. It believes that its extensive knowledge of human rights practices in Saudi Arabia and of international human rights standards will assist this Court in determining whether the abusive conduct alleged to have occurred in this case should be treated as commercial activity under the Foreign Sovereign Immunities Act because it is consistent with the way the Saudi government often resolves commercial disputes.

Statement of the Case

In September 1983, respondent Scott Nelson ("Nelson"), a 29-year-old U.S. citizen working in Kentucky as a senior electrical engineer for Bechtel, saw a magazine advertisement for a job as a monitoring systems engineer at the King Faisal Specialist Hospital (the "Hospital"), a government-owned and operated medical center in Riyadh, Saudi Arabia. J.A. 4, 57.[1] The advertisement had been placed by an American corporation that had contracted with the Saudi government to act as its agent in the recruitment of employees in the United States. The

1 Citations to "J.A." refer to the Joint Appendix.

job's responsibilities were "to inspect and monitor all hospital facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others." J.A. 4.

Nelson applied for the job and traveled to Saudi Arabia for interviews. He then returned to the United States, where he executed a contract of employment in Miami and participated in a brief orientation program in Nashville. In December 1983, Nelson and his wife, Vivian, traveled to Saudi Arabia, where Nelson began his employment.

Nelson claims that in March 1984, in the course of performing his duties as a monitoring systems engineer, he discovered a highly dangerous defect in the Hospital's oxygen and nitrous oxide lines. He reported it to his superiors and eventually to a governmental commission of investigation, but no corrective action was taken, and he was instructed to ignore the problem. He thereafter began to face harassment on the job and twice tried to resign, but the Hospital refused to accept his resignation or return his passport. J.A. 52-53.

On September 27, 1984, Nelson was asked to come to the Hospital's security office. Nelson later described some of what happened next in testimony before a Congressional subcommittee investigating the mistreatment of Americans employed in Saudi Arabia:

> I was met there by two investigators who wanted to interview me for a few minutes. Neither investigator spoke English. I was then taken to the Criminal Investigation Division, CID. There, in a small cell, a man put me in foot shackles and pushed me to the floor. Four men then entered the cell; one man slapped me in the face, breaking my glasses. Another then punched me in the back of the neck and lower back. Two of the men held my feet while another pulled my shoes off and beat my feet with bamboo canes approximately 1/4 inch in diameter. . . .
>
> I was punched, kicked and slapped on the back, chest, legs and face repeatedly for about thirty or thirty-five minutes. Afterwards, water was thrown on my face and the beat-

ings resumed for approximately fifteen-twenty more minutes. I was then released from the shackles. All the while no one spoke any English to me at all. Four days passed and I had not been fed since my arrest. On October 1, 1984, I was taken to an office of the Head of the Prison. There I was met by Mr. Omar, a translator from the hospital. The first thing he said to me was sign anything they ask or I will continue to be beaten until I sign any statement they asked me for.

I then signed a statement totally in Arabic that was never interpreted to me. I was then returned to my cell.

After 15 to 20 minutes later, the U.S. Embassy agents . . . talked with me. They had been ordered not to speak with me about my arrest, only about my family. They told me that I should be released in one week at the most. I was given the statement to sign by Lt. Abdullah Aziz. He said that I did nothing wrong in Saudi Arabia and should be released within a week.

I told the Embassy about my beatings. They told me that if a report was filed by them it could make matters worse for me.

On October 3, 1984, I was transported to Al Sijan Prison to await trial on unknown charges. On October 4, 1984 (one week after my arrest), I was visited by the Embassy. They told me that they could not do anything for me, but that they expected my release in "one to two weeks." I never saw any Embassy personnel again.

J.A. 53-54.

Nelson was kept in custody for 39 days. J.A. 54. During his incarceration, his wife was given only sketchy information about him, but a Saudi official offered to obtain her husband's release if she would spend a weekend with him. J.A. 5, 54. Finally, after a U.S. Senator and Congressman intervened, Nelson was released from custody on November 5, 1984. J.A. 54, 60.

The parties disagree about the reason for Nelson's arrest, but agree that his arrest arose from his position at the Hospital. Nelson claims that he was arrested in retaliation for his actions as a whistle blower. Petitioners claim that he was arrested because he had falsified his academic credentials in applying for his job. In either event, no charges were ever filed against Nelson. J.A. 5. After his release from custody, he was prevented from leaving Saudi Arabia for one week. As soon as he could retrieve his passport, however, he and his wife returned to the United States, where he underwent repeated orthopedic surgery and physical therapy for injuries to his knees and back caused by the beatings. J.A. 5, 55, 61.

The Nelsons thereafter commenced this action in the U.S. District Court for the Southern District of Florida. They seek compensatory and punitive damages from the Saudi government, the Hospital, and Royspec, a government-owned procurement agency. Their complaint (J.A. 3-21) asserts various intentional tort claims on Nelson's behalf—for battery, wrongful arrest, false imprisonment and torture—as well as claims for a negligent failure to warn, and derivative claims on behalf of Vivian Nelson.

The defendants, petitioners here, moved to dismiss the action for lack of subject matter jurisdiction, claiming, among other things, that each of them was a foreign state or instrumentality of a foreign state and thus immune from suit in this country pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*

The District Court dismissed the action for lack of subject matter jurisdiction under the FSIA. J.A. 91-98. The Court of Appeals reversed, holding that this action falls within the exception for "commercial activity" contained in the first clause of § 1605(a)(2). *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991); *see also* J.A. 99-115. After the Court of Appeals denied a petition for rehearing made by petitioners and supported by the U.S. government (J.A. 133), this Court granted certiorari.

Summary of Argument

In interpreting whether the actions of a foreign government amount to "commercial activity," the FSIA requires examination of whether the actions are part of "a regular course of commercial conduct." 28 U.S.C. § 1603(d). Because the Saudi government often uses detention and torture to resolve commercial disputes, its abusive treatment of Nelson should be held to fall under the "commercial activity" exception to the FSIA.

Moreover, international law requires that torture victims be given an opportunity to obtain compensation from those responsible for their mistreatment. Because Nelson is extremely unlikely to obtain civil redress in Saudi courts, and in light of his recruitment in the United States, this Court should resolve any ambiguity in the reach of the "commercial activity" exception in favor of providing Nelson a civil remedy in U.S. courts.

Argument

I. NELSON'S TORTURE AND ARBITRARY DETENTION SHOULD FALL UNDER THE "COMMERCIAL ACTIVITY" EXCEPTION TO THE FSIA BECAUSE SAUDI OFFICIALS OFTEN COMMIT SUCH ABUSES IN CONNECTION WITH COMMERCIAL DISPUTES

A. The "Commercial Activity" Exception Should Be Interpreted in Light of the Saudi Government's "Regular Course of Commercial Conduct"

In its most recent decision under the FSIA, *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992), this Court observed that the principal ambiguity in the FSIA's exception for "commercial activity" lies in the definition of the word "commercial." The Court commented, however, that the FSIA "was not written on a clean slate," but embodies the "restrictive theory" of foreign sovereign immunity adopted by the State Department in 1952. *Id.* at 2165. Under that theory, there is immunity "only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976). Therefore, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, *supra*, at 2166.

This Court further observed in *Weltover* that under the FSIA it is the "nature" of the act and not its "purpose" that is determinative of its commercial character. The Court explained:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

112 S.Ct. at 2166 (citation omitted).

Petitioners argue that the decision of the Court of Appeals in the present case contravenes the FSIA by "requiring Saudi Arabia to appear in a United States court to defend the manner in which it enforces its laws and exercises its police power within its own borders." Pet. Br. at 15.[2] Petitioners go on to claim that "a foreign state's actions such as arrest, interrogation, imprisonment, and physical punishment are plainly actions of a governmental rather than commercial *nature*," even if "they relate to a commercial *purpose*." Pet. Br. at 16 (emphasis in original).

Petitioners misconstrue *Weltover*, the plain meaning of the FSIA, and the intent of Congress. In § 1603(d), the FSIA defines "commercial activity" in pertinent part as "a regular

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2 Citations to "Pet. Br." refer to the Brief for Petitioners.

course of commercial conduct." This broad language was intended to provide the courts with "a great deal of latitude in determining what is a 'commercial activity' " so as to "includ[e] a broad spectrum of endeavor." H.R. Rep. No. 94-1487 at 16, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604.

The Saudi government's alleged torture and arbitrary detention of Nelson in connection with his employment dispute should be considered "commercial activity" for the purpose of the FSIA because, as we show, in addition to being used for a "commercial purpose," torture and arbitrary detention by the Saudi government assume a "commercial nature" because they are often used to resolve commercial disputes, particularly when the royal family and its close associates have an interest.

B. The Saudi Government's "Regular Course of Commercial Conduct" Includes the Use of Torture and Arbitrary Detention In Connection With Commercial Disputes

According to first-hand research conducted by Middle East Watch, it is common practice for public and private enterprises to enlist the Saudi government to detain and sometimes torture adverse parties in commercial disputes. Saudi law does not require written authorization for such arrests. Disputes that can trigger detention include nonpayment of debts, employment disputes, and the failure to fulfill contractual obligations. To "resolve" these disputes, the police detain the adverse party and use force, including slapping and beating with bamboo sticks, to secure concessions. The Division of Civil Rights (*al-Huquq al-Madaniyya*), the division of the Ministry of Interior that is responsible for enforcement of civil claims, is particularly notorious for such abuse.

Middle East Watch knows of scores of people who are currently detained without charge or trial as a result of commercial disputes. Some of these businessmen have been kept in detention for years. After an initial period of incommunicado detention, family visits are usually authorized. The prisoner

and his family are then advised to seek an accommodation with the person who initiated the complaint.

Although both Saudis and foreigners are subject to such detention and abuse, foreigners are particularly vulnerable because of the fear that they might flee, especially if their assets in the country are small in relation to the amount in dispute. Detention occurs even though foreigners may not legally leave Saudi Arabia, or the locality in which they reside, without the express permission of their *kafil*, or Saudi sponsor—either an employer or a senior business partner.[3]

Police action is particularly likely if, as in the case of Nelson, the Saudi royal family or a prominent Saudi citizen has an interest in the case. Because King Faisal Specialist Hospital is an elite hospital established to provide care primarily to the royal family, senior officials and their associates, hospital officials are likely to have had access to the royal family to pursue their dispute with Nelson. The royal family, in turn, controls the Ministry of Interior, which oversees—either itself or through regional governors—all internal security forces in the country. The Minister of Interior is Prince Nayef ibn Abdel-Aziz, and his deputy is Prince Ahmed ibn Abdel Aziz, both full brothers of King Fahd. All regional governors in Saudi Arabia are members of either the royal family or the Sudairi family, the maternal relatives of the King.

Despite its brief in support of its close ally, the U.S. government has previously acknowledged the Saudi government's use of arbitrary detention to resolve commercial disputes. In an October 8, 1986 letter to Rep. Mel Levine, then Secretary of Commerce Malcolm Baldrige wrote:

> The distinction between civil and criminal law remedies in Saudi Arabia is blurred, and personal detention pend-

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3 At the beginning of employment and upon return from foreign travel, a foreigner must surrender his passport to the sponsor. To travel within the country, a foreigner needs his passport and a letter from his sponsor. To leave the country, a foreigner needs an exit visa, which cannot be obtained without permission of the sponsor indicated on his passport.

> ing the settlement of a commercial dispute can occur. . . .
>
> We regularly provide businessmen with brochures and other material on Saudi Arabia containing a warning on this legal practice. We advise individuals with commercial disputes pending in Saudi Arabia not to enter the country.

Similarly, on June 15, 1987, James B. Kelly, then a deputy assistant secretary of commerce, told the House Subcommittee on Europe and the Middle East: "The lack of distinction between civil and criminal law in Saudi Arabia permits the detention of resident and visiting businesspersons for what we would consider a commercial dispute."[4]

Middle East Watch has investigated a substantial number of cases of businessmen and foreign workers who were detained for having run afoul of their Saudi partners or members of the royal family. Some, after their release, reported that they had been tortured during detention.

For example, in March 1991, in a villa used as a detention facility in Riyadh, Middle East Watch interviewed Abdalla Saleh al-Rajhi, a Saudi banker who had been arrested in early 1980. As of mid-August 1992, he was still in detention. Al-Rajhi was arrested after the government closed down his investment company because certain foreign investors had complained that its aggressive investment policy in precious

4 The U.S. government has also described the Saudi government's related practice of denying American businessmen exit visas pending resolution of commercial disputes with their Saudi associates. In a letter to Rep. Levine dated October 21, 1986, then Assistant Secretary of State for Legislative and Intergovernmental Affairs J. Edward Fox wrote:

> Over the past twelve months, our Mission in Saudi Arabia has received reports of twenty-six commercial and labor disputes which have resulted in the retention of an American citizen's passport or the barring of the American's exit from the Kingdom pending resolution of the dispute.

Copies of these statements are on file in Human Rights Watch's offices and can be made available to the Court.

metals had exposed them to too great a risk. After twelve years in detention, he has not been tried or allowed even to consult with legal counsel, although he is permitted family visits. A secret committee at the Ministry of Interior has reviewed his case, but its findings have not been revealed. Neither al-Rajhi nor any representative was permitted to attend the committee's deliberations.

In another case which, like Nelson's, involved an alleged whistle blower, a government employee reported being detained for four weeks and severely beaten by officers of the Directorate of General Investigations (*al-Mabaheth al-`Amma*), the secret police, because he was suspected of sending an anonymous letter charging that his superiors were involved in skimming funds earmarked for projects.[5] The interrogators sought to force him to confess that he was the author of the letter.

The following are a few of the many cases investigated by Middle East Watch:

- Sam Joseph Bamieh, chairman of the board of Industrial Development Group, Inc., traveled to Saudi Arabia in February 1986 after having filed suit in a California court against one of his business associates, Muhammed Omran, the former head of King Fahd's private office. On March 2, after Omran was served with papers for the California action, Bamieh was interrogated vigorously by two of King Fahd's close associates. He was threatened with death if he did not drop his suit, and when he refused, he was instructed not to leave the country and put under close surveillance. For two months, from May 12 to July 14, he was detained in a government guest house. He was released after he instructed his attorney to obtain a dismissal with prejudice of the California lawsuit and to send the ruling by courier to Saudi Arabia.

5 This victim and several others interviewed by Middle East Watch requested that their names not be revealed for fear of retaliation by Saudi authorities.

- In August 1991, Neville Norton, a British businessman, was released after spending five years in detention without charge or trial. For the previous 11 years, his passport had been confiscated and he was unable to leave the country. The reason for this treatment was his failure to finish projects for and pay debts he owed to his sponsor, Prince Nayef ibn Abdel-Aziz, King Fahd's brother and currently the Minister of the Interior (at the time, Prince Nayef was Deputy Minister of the Interior).

- Keith Carmichael, a British citizen and the head of SACEM International, a transnational construction firm, told Middle East Watch that in 1981 a dispute arose over a SR350,000 (US$93,000) commission and another SR400,000 that SACEM allegedly owed SIGMA, a company owned by Prince Abdalla al-Faisal al-Saud, a prominent businessman, and operated by his son, Prince Saud. When negotiations failed, Carmichael feared that he would be imprisoned at the behest of Prince Saud and tried to flee to Qatar, where he was arrested by Qatari police, returned to Saudi Arabia, and detained without trial from November 2, 1981 to March 7, 1984. During interrogation by the Directorate of General Investigations and later by the Division of Civil Rights, he was held incommunicado, beaten and denied adequate medical attention. He was released when the British government intervened.

- Bruce Munden, an American, told Middle East Watch that after his Saudi business partners accused him of owing them $175,000, the Saudi police arrested him and kept him in jail for eight months. Several times during his first week in detention he was handcuffed to a rack for an hour at a time with his legs spread, his feet shackled, and his toes barely touching the ground. He was never charged or tried.

- A businessman who requested anonymity established a number of franchises in 1990 that competed with an existing chain owned by a senior member of the royal family. His rival complained to the governor, a cousin, that the new businesses were unfairly competing with his outlets. A number of the new facilities were closed down and the businessman was detained until he agreed to relocate them.

In light of the Saudi government's consistent use of detention and torture to resolve commercial disputes in which it has an interest, its alleged detention and torture of Nelson in connection with his employment dispute should be considered "commercial activity" within the meaning of the FSIA. *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (embassy acted as "collection agent," not a foreign sovereign, in extracting payments from plaintiff).

II. BECAUSE TORTURE AND ARBITRARY DETENTION ARE INVOLVED, ANY AMBIGUITY IN THE REACH OF THE "COMMERCIAL ACTIVITY" EXCEPTION SHOULD BE RESOLVED IN LIGHT OF THE DUTY UNDER INTERNATIONAL LAW TO PROVIDE NELSON AN OPPORTUNITY TO SECURE COMPENSATION

Petitioners argue that because of the importance of avoiding "judicial intrusion into the internal affairs of foreign states," "this Court should be especially reluctant to construe the 'commercial activity' exception in an expansive manner that would subject the internal public acts of a foreign sovereign to the scrutiny of United States courts." Pet. Br. at 31. Whatever merit that argument might have ordinarily, it deserves no deference when the acts in question involve torture and arbitrary detention of a victim recruited in the United States. At the height of the Cold War, it was common to hear from abusive countries that examination of their human rights records was interference in their internal affairs. Fortunately, that argument has now been firmly discredited. *See Human Rights Watch World Report 1992*, p. 3.

Today, it is firmly established that torture and arbitrary detention violate international law and that, at the very least, torture victims should have an opportunity to obtain compen-

sation. Because, as we show, Nelson is extremely unlikely to be able to obtain civil redress in Saudi courts, and given his recruitment in the United States, this Court should construe any ambiguity in the reach of the "commercial activity" exception in favor of providing him a civil remedy for his ordeal in U.S. courts.

A. The Saudi Government's Alleged Treatment of Nelson Constitutes Torture

The Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), June 26, 1987, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), is the leading international instrument on torture. The U.S. Senate has given its advice and consent to the Convention, and President Bush has signed the instrument of ratification, which will be deposited with the U.N. Secretary-General once Congress passes the necessary implementing legislation. Article 1(1) of the Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[6]

6 The U.S. government has elaborated on this definition, noting that torture must be committed by someone acting in an official capacity or with the acquiescence of a person in an official capacity, "it must be an extreme form of cruel and inhuman treatment, it must cause severe pain and suffering, and it must be intended to cause severe pain and suffering." Message from the President of the United States Transmitting the Torture Convention, Treaty Doc. 100-20, 100th Cong., 2d Sess. at 3 (1988).

Nelson's complaint alleges on its face that he was subjected to torture under this standard. According to the complaint, Nelson was beaten and tortured while being held by Saudi law enforcement officers for 39 days without being advised of any charges or accused of any crimes. The apparent purpose was to force him to sign certain "Arabic papers" which he did not understand and were not translated to him.

A variety of international fora have held that treatment similar to that accorded Nelson constitutes torture. For example, Article 7 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("Covenant"), provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States ratified the Covenant in June 1992. The Human Rights Committee, a body of experts empowered to hear individual complaints of violations of the Covenant, has held that beatings during captivity are torture. *See, e.g., Bleier v. Uruguay*, (30/1978), Report of the Human Rights Committee, 37 U.N. G.A.O.R. Supp. (No. 40) Annex X, at 130 (1982); *Bazzano (Hernandez) and Massera v. Uruguay*, (5/1977), Report of the Human Rights Committee, 34 U.N. G.A.O.R. Supp. (No. 40) Annex VII, at 124 (1977).

Similarly, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("European Convention"), provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The European Commission on Human Rights, which is empowered to consider petitions concerning violations of the Convention, has held that beatings by law enforcement officers of a person in custody constitute torture. *See, e.g., The First Greek Case (Denmark, Norway, Sweden, & Netherlands v. Greece)*, 12 Y.B. Eur. Conv. on Hum Rts. 499 (1969).

Likewise, Article 5(2) of the American Convention on Human Rights ("American Convention") categorically prohibits torture. Nov. 22, 1969, Treaty Series No. 36, O.A.S. Off. Rec. OEA/Series K/XVI/1.1. The Inter-American Commission

on Human Rights, which is empowered to consider complaints of human rights violations in the Americas, has also found that police beatings of prisoners are torture. *See, e.g., Gomez v. El Salvador*, Report No. 6/92, Case 10.190, 1991 Annual Report of the Inter-American Commission on Human Rights 99, 101, 104 (Feb. 4, 1992), O.A.S. Doc. No. OEA/Ser.L/V/II.81 rev.1 Doc.6 (Feb. 14, 1992).

B. International Law Establishes a Duty to Provide Torture Victims With an Opportunity to Obtain Compensation

The international prohibition against torture is so strong that it is one of the few human rights norms that have achieved the status of *jus cogens*, a peremptory norm from which no derogation is ever allowed. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); Restatement (Third) of the Foreign Relations Law of the United States § 102 comment k, § 702(d) (1987).

Reflecting this status, Article 14 of the Torture Convention states that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." The Covenant (Art. 2(3)), the American Convention (Art. 25) and the European Convention (Art. 13) also require that individuals be given an effective remedy in such cases.

In a general comment on the Covenant, the Human Rights Committee found that Article 2(3) requires that "the alleged victims [of torture] must themselves have effective remedies at their disposal, including the right to obtain compensation." General Comments under Art. 40, ¶ 4 of the Covenant, *Report of the Human Rights Committee*, 37 U.N. G.A.O.R. Supp. (No. 40) Annex V, General Comment 7(16), at 94, ¶ 1 (1982).

The Human Rights Committee's case law confirms the right of torture victims to obtain compensation. In *Estrella v. Uruguay*, (74/1980), *Report of the Human Rights Committee*, 38 U.N. G.A.O.R. Supp. (No. 40) Annex XII, at 150 (1983),

the Human Rights Committee ruled that Uruguay was "under an obligation to provide [one of its torture victims] with effective remedies, including compensation." *Accord, Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights, Series C, No. 4, ¶¶ 166, 174, 175.

Because, as we show, Saudi Arabia provides no civil (or criminal) remedies to torture victims, and in light of Nelson's recruitment in the United States, this Court should interpret any ambiguity in the reach of the "commercial activity" exception to the FSIA to provide Nelson with a civil remedy in U.S. courts.

C. Saudi Arabia Provides No Effective Remedies for Torture or Arbitrary Detention

Saudi Arabia has no legal regime to protect against arbitrary arrest, lengthy pretrial detention or physical abuse. It has no bill of rights or comparable legal guarantees. It has declined to sign most international human rights agreements, including the Covenant and the Torture Convention. Indeed, Saudi Arabia was one of only a handful of countries—South Africa and former Soviet Bloc countries were the others—that did not vote for the Universal Declaration of Human Rights when it was adopted by the U.N. General Assembly on December 10, 1948.

On March 1, 1992, amid great fanfare, King Fahd issued the Basic Law of Government—the closest that the country has ever come to adopting a constitution. The Basic Law provides in Article 26 that "[t]he state shall protect human rights according to Shari`a," or Islamic law. This provision marks the first time in Saudi history that the government has formally acknowledged the concept of citizens' rights vis-a-vis the state.[7] However, in the few instances in which the new law

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7 The Saudi government's use of the phrase "civil rights" (*al-huquq al-madaniyya*) should not be confused with the concept of human rights, since it refers only to civil claims among private citizens. Indeed, as noted, the Saudi Ministry of Interior's Department of Civil Rights, which oversees such matters, has frequently been implicated in human rights violations in its zeal to protect property rights.

refers to specific civil and political rights, the protection afforded is highly qualified.[8] Moreover, the reference to the Shari`a is problematic because the Shari`a as applied in Saudi Arabia is not codified in written laws. The final nominal authority for its interpretation is the government-appointed Council of Senior Scholars, which has traditionally deferred to the King's interpretation in political matters, including those implicating human rights. Despite the Basic Law, the Saudi government thus retains near complete discretion to define the content and scope of the rights it will respect.

1. Saudi Law Provides No Protection Against Arbitrary Arrest and Detention

Saudi arrest and detention procedures are governed by Imprisonment and Detention Law No. 31 of 1978, together with Bylaws issued in 1982 by the Minister of Interior. They place few restrictions on the grounds or duration of pretrial detention. Detainees may be held indefinitely without trial or judicial review. Nor is there a requirement that family members be notified of the arrest. Although in recent years a family is often able to find out if one of its members is detained, formal notification is rare.[9] It is equally rare for a detainee to be informed of the charges against him or her. Saudi law permits interrogation of detainees without the benefit of counsel.

2. Saudi Law Provides No Protection Against Torture or Cruel and Inhuman Punishment

Saudi law contains no explicit ban on torture or cruel and inhuman punishment. Indeed, the use of force to elicit confessions is common in the Saudi security system. Harsh conditions of detention are also frequently imposed to punish prisoners.

8 For a detailed analysis of the limits to these guarantees, see Middle East Watch, *Empty Reforms: Saudi Arabia's New Basic Law* (1992).

9 The U.S. Embassy in Riyadh has complained that Saudi authorities rarely notify it of the arrest of U.S. citizens. According to State Department officials interviewed by Middle East Watch in September 1992, Saudi Arabia has declined to sign a bilateral consular treaty to allow for immediate access.

While Imprisonment and Detention Law 31 of 1978 prohibits "any assault whatsoever on prisoners and detainees" (Article 28), the same law explicitly sanctions methods of discipline that violate international standards, such as flogging, indefinite solitary confinement, and deprivation of family visits and correspondence (Article 20). Flogging and amputations are also imposed by the courts as punishment for a variety of crimes. Saudi security officials interviewed by Middle East Watch over the past two years did not consider flogging or hitting detainees to extract confessions to be forms of torture or cruel or inhuman punishment. Although they professed a preference for the use of "psychological methods" to obtain confessions, they believed that beating and slapping suspects is permissible and that torture consists of only severe abuse such as electric shock and fingernail extraction.

Despite occasional royal orders instructing detention authorities not to torture prisoners—usually issued after the death of a detainee due to torture—there have been numerous reports of torture in Saudi detention facilities. For example, in its most recent report on human rights in Saudi Arabia, the U.S. State Department described "credible reports of injuries and the deaths of at least two, and possibly more, persons caused by beatings or the use of excessive force while being held in official custody. In addition, there was a credible report of the torture of several foreigners in Saudi military custody." U.S. Department of State, *Country Reports on Human Rights Practices for 1991*, at 1577, February 1992 ("*Country Reports*").

Middle East Watch knows of no case in which an officer accused of torture has been brought to trial in Saudi Arabia. Results of investigations into deaths in custody have never been made public. As the U.S. State Department recently observed, "It is general [Saudi] government policy not to respond to" reports of mistreatment of prisoners. *Id.* In addition, the Saudi government has never allowed independent observers to visit its detention facilities, with one exception

when, after months of refusal, it allowed the International Committee of the Red Cross to visit Iraqi prisoners of war after the beginning of the Desert Storm military campaign on January 17, 1991.

3. There Is No Independent Judiciary in Saudi Arabia To Enforce Remedies for Violations of Basic Rights

The March 1992 Basic Law of Government formally recognizes the principle of an independent judiciary for the first time in Saudi Arabia. However, Middle East Watch has continued to receive reports from within the judiciary that judges periodically come under pressure from senior members of the royal family and other government officials, and thus still do not feel free to check official abuse of power. As the State Department noted in its most recent *Country Reports*, "Jurists are . . . aware and reportedly have on occasion acceded to the power and influence of the royal family and their associates." *Id.* at 1579. Moreover, under the Saudi government's interpretation of the Shari`a, the king is the spiritual as well as temporal head of the community (*waliyy al-amr*) and thus has broad discretion to overrule judicial decisions.

Since 1955 Saudi Arabia has had an administrative court, the Board of Grievances, which theoretically can contest government decisions. However, the Board regularly defers to the wishes of the Council of Ministers and the King. According to Article 15 of its 1982 charter, its "judges" can be removed by the King at any time.

Middle East Watch knows of no incident in which the Board of Grievances has provided a victim redress against a Saudi government agency or official accused of torture, mistreatment of prisoners, or unlawful detention. A former senior official of the Board of Grievances interviewed by Middle East Watch in June 1992 also could not recall a single such case. Nelson thus is virtually precluded from obtaining civil redress in Saudi Arabia for his alleged torture and arbitrary detention. Given his

recruitment in the United States, his only realistic recourse is in U.S. courts.

Conclusion

The order of the Court of Appeals should be affirmed and the case remanded to the District Court for further proceedings.

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